IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEAL
(Griffin, P.J., and Meter, and Kelly, J.J.)

SHARDA GARG,

Plaintiff-Appellee and
Cross-Appellant,

v

MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES, a governmental agency of MACOMB COUNTY,

Defendant-Appellant and
Cross-Appellee.
_____/

Supreme Court
No: 121361

Court of Appeals
No.: 223829

Macomb County Circuit Court
No.: 95-3319 CK

BRIEF FOR DEFENDANT-APPELLANT MACOMB COUNTY COMMUNITY MENTAL HEALTH SERVICES

ORAL ARGUMENT REQUESTED

KITCH DRUTCHAS WAGNER
DENARDIS & VALITUTTI

By: SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38698)
Attorneys for Defendant Macomb County
Community Mental Health Services
One Woodward Avenue, 10th Floor
Detroit, Michigan 48226
(313) 965-7905

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ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

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48226-3499

(313) 965-7900

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ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

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KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

STATEMENT REGARDING JURISDICTION

This matter is before this Court on leave granted by order of April 15, 2004. MCR 7.301(A). The issues to be briefed include:

(1) Whether plaintiff established a prima facie case regarding either of her two theories of retaliation, (2) whether a new trial is required because one of the theories submitted to the jury was unsupported by the proofs, (3) whether the continuing violations doctrine of Sumner v Goodyear Tire & Rubber Co, 427 Mich 505 (1986), should be preserved, modified, or abrogated in light of the language of the statute of limitations, MCL 600.5805(1), and the United States Supreme Court's decision in Nat'l Rail Passenger Corp v Morgan, 536 US 101 (2002), and (4) whether plaintiff received an award of future damages within the meaning of MCL 600.6013(1), thus barring prejudgment interest on that amount.

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE AS TO EITHER OF HER TWO THEORIES OF RETALIATION FOR ENGAGING IN ACTIVITY PROTECTED BY THE CIVIL RIGHTS ACT, REQUIRING A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT AS A MATTER OF LAW?

Defendant Macomb County Community Mental Health Services submits the answer is "Yes."

The trial court held the answer is "No."

The Court of Appeals held the answer is "No."

The plaintiff asserts the answer is "No."

II

WHETHER, ALTERNATIVELY, A NEW TRIAL IS REQUIRED BECAUSE OF THE SUBMISSION TO THE JURY OF AT LEAST ONE THEORY OF RETALIATION LIABILITY WHICH WAS UNSUPPORTED BY THE PROOFS, AND AS TO WHICH A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED?

Defendant Macomb County Community Mental Health Services submits the answer is "Yes."

The trial court held the answer is "No."

The Court of Appeals held the answer is "No."

The plaintiff asserts the answer is "No."

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

III

WHETHER, ALTERNATIVELY, THE CONTINUING VIOLATIONS DOCTRINE OF SUMNER V GOODYEAR TIRE & RUBBER CO, 427 MICH 505 (1986), SHOULD BE ABROGATED IN LIGHT OF THE LANGUAGE OF THE STATUTE OF LIMITATIONS, MCL 600.5805(1) OR, AT A MINIMUM, MODIFIED IN LIGHT OF NAT'L RAIL PASSENGER CORP V MORGAN, 536 US 101 (2002), AND A NEW TRIAL GRANTED TO DEFENDANT?

Defendant Macomb County Community Mental Health Services submits the answer is "Yes."

The trial court held the answer is "No."

The Court of Appeals held the answer is "No."

The plaintiff asserts the answer is "No."

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

STATEMENT OF FACTS

Defendant Macomb County Community Mental Health Services, a governmental agency of Macomb County, appeals from the March 29, 2002, decision of the Court of Appeals (Griffin, PJ, and Meter and Kelly, JJ) (apx 266a-271a), affirming the judgment for plaintiff Sharda Garg in the amount of $354,298.17 (apx 247a). That judgment was entered in the Macomb County Circuit Court on August 17, 1998 by the Honorable George Montgomery on a jury verdict of $250,000 following a trial before the Honorable Roland Olzark from March 27 to April 23, 1998.

Procedural History

Plaintiff Sharda Garg has been employed since 1978 by defendant Macomb County Community Mental Health Services as a psychologist (classified as a "Therapist-II"). Plaintiff filed her complaint on July 21, 1995, alleging that she had not received more than a dozen transfers or promotions for which she had applied since 1983 because of national origin discrimination and/or in retaliation for engaging in protected activities in violation of the Civil Rights Act (apx 4a, complaint).

Plaintiff in her original complaint claimed the retaliation was only as a result of a union grievance in which she had complained about discrimination in 1987. Plaintiff later amended her complaint to allege that she also had been retaliated against because of her opposition in 1981 to sexual harassment (apx 21a, first amended complaint).

By way of motion for summary disposition before trial, and again by motion to

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
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(313) 965-7900

dismiss/for directed verdict during trial (apx 140a-143a, Tr, pp 802-805)[1], defendant sought dismissal of plaintiff's claims of retaliation or discrimination asserted as to promotions or transfers before 1992, more than three years before the commencement of this lawsuit on July 21, 1995. Defendant submitted that claims based on the denial of promotions in 1992 and earlier were barred by the three-year statute of limitations.

Defendant's motion prior to trial was denied by opinion and order of July 10, 1996. The court ruled that plaintiff's claims were rendered timely by the continuing violation doctrine in Sumner v The Goodyear Tire and Rubber Co, 427 Mich 505; 348 NW2d 256 (1986) (apx 14a-15a, opinion denying motion for summary disposition, pp 4-5). Defendant's application for leave to appeal this ruling was denied by the Court of Appeals (docket no 198641), and the matter proceeded to trial in April 1998.

Following the close of plaintiff's proofs, defendant moved for a directed verdict specifically as to, inter alia, each of the two separate retaliation theories. Defendant also renewed its request for dismissal, based on the statute of limitations, of all claims related to the loss of promotions before 1992 (apx 139a, 140a-143a, Tr, pp 778, 802-805).

The trial court eventually agreed, and instructed the jury, that claims of discrimination for promotions denied before 1992 were barred by the statute of limitations. The court also ruled, and instructed the jury, however, that the statute of limitations did not bar or limit the retaliation theories (apx 220a, 238a, Tr 4/22/98, pp 9, 126). Plaintiff thus was permitted to assert a claim for damages under her two

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

[1] Trial transcripts were sequentially paginated from the first day on 4/1/98 through 4/21/98 and are referred to as Tr; transcripts of 4/22/98 and of other proceedings are specifically referenced by date.

retaliation theories for the denial of all 18 promotions and transfers, extending back 15 years to 1983. The court also denied the remainder of the motion for directed verdict (apx 241a-245a, Tr 4/22/98, pp 136-140).

The jury was instructed by the trial court with respect to plaintiff's two, separate retaliation theories--one based on opposing sexual harassment, and the other based on filing a grievance (apx 239a-240a, Tr 4/28/98, pp 127-128).[2] Defendant had specifically requested a special verdict form which delineated between and required specific jury findings as to each of the two separate retaliation claims and damages, past and future, related to each. The trial court, however, declined to give such a lengthy verdict form, electing instead to give the truncated version upon which the jury ultimately returned its verdict (apx 221a-22a, Tr 4/22/98, pp 11-12, apx 250, 8/6/98 opinion acknowledging regret at this decision, apx 28a-32a, defendant's proposed special verdict form, questions 1, 3 and 6).

The jury returned a verdict finding that plaintiff was not discriminated against based on her national origin or color. The jury did find, however, that plaintiff was retaliated against because she "opposed sexual harassment [in 1981] or because she filed a complaint or charge about being discriminated against [in 1987]" (apx 247a, verdict form). The trial court subsequently denied defendant's motion for judgment

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[2] While plaintiff's appellate counsel has suggested that the retaliation claim was also based on retaliation for protected activity in the nature of a letter written by plaintiff's trial counsel to defendant in 1994, this is not correct. The letter made no reference to discrimination or any protected activity. The complaint was never amended to add this theory. Plaintiff's counsel at trial identified, and the instructions to the jury also identified, only two bases for retaliation--opposing sexual harassment, or the filing of a union grievance (apx 135a, 147a, 217a, 229a-230a, Tr pp 667, 810, 1355, Tr 4/22/98 pp 46-47, 68-69, 74, 127).

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ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

notwithstanding the verdict and new trial by opinion and order of November 3, 1999 (apx 254a).

Factual Background And Plaintiff's Two Retaliation Theories

Plaintiff, who is of Indian national origin, has worked as a psychologist at Macomb County Community Mental Health Services and has been a union member since 1978 (apx 48a, Garg, Tr, p 96). Until 1995, plaintiff worked in the Life Consultation Center with the developmentally disabled ("LCC"). Those in the chain of command above plaintiff as her direct and indirect supervisors in LCC during that time included, at one time or another, Donald Habkirk, Margaret Porkka, Joanna Bielenin, Terri Hibbard and Terry Falasa. Kent Cathcart was in plaintiff's chain of command only from 1986 to 1995. During that time, mentally ill clients were treated in a separate division ("Mental Division.") Supervisors in the Mental Division (to which plaintiff unsuccessfully applied for various positions) included Ms. Demery, Ken Courtney and Susan Griggs (apx 36a-42a, Garg, Tr, pp 56-61, 67).

Plaintiff's 1981-based retaliation theory (added by the first amended complaint) was that she had been retaliated against since 1983 because she had in 1981 opposed sexual harassment by a supervisor, Mr. Habkirk. Plaintiff's theory in this regard was, quite simply, bizarre.

There was no claim by Sharda Garg or her counsel that plaintiff believed she herself was sexually harassed by Mr. Habkirk. Plaintiff's counsel repeatedly affirmatively represented that plaintiff herself was never sexually harassed and, therefore, plaintiff was not opposing sexual harassment of herself (apx 33a-35a, opening at Tr, pp 16-18, apx 232a-236a, closing at Tr 4/22/98, pp 60, 68-69, 113-114,

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apx 206-217a, Garg Tr, pp 1344-1355). Plaintiff's counsel declared: "Let me be perfectly clear . . . . We are not saying that it was her belief that she was being sexually harassed . . . (apx 144a-147a, argument on directed verdict motion at Tr, pp 807-810).

Rather, it was plaintiff's counsel's theory that Sharda Garg was retaliated against for opposing sexual harassment by Mr. Habkirk of other employees which Ms. Garg had observed (apx 255a, plaintiff's JNOV response brief, p 2). This alleged harassment, according to plaintiff's counsel, consisted of two specific instances of "unusual behavior" by Mr. Habkirk toward other employees at some unknown time in 1981. These consisted of Mr. Habkirk pulling one employee's bra strap, and snapping the elastic on the panties of another. Plaintiff could not recall, however, if these two incidents occurred before or after the incident with Mr. Habkirk; she could only indicate that they occurred "around the same time." (Apx 59a, 62a-63a, Garg, Tr, pp 123, 126-127.)

Even more unusual was the means by which plaintiff purportedly "opposed sexual harassment" by Mr. Habkirk of plaintiff's coworkers. This consisted of plaintiff swatting a coworker in 1981 when the individual approached her from behind in a hall and simply tapped her on the shoulder. Plaintiff admitted she did not know who tapped her shoulder, or whom she swatted until afterwards, as she acted purely reflexively when touched from behind. It was only after this admittedly reflexive act, that plaintiff discovered the hand was that of Mr. Habkirk (apx 58a-68a, Garg, Tr, pp 122-132).

There was no evidence or claim that the shoulder tapping by Mr. Habkirk was inappropriate or sexual in nature. Plaintiff never said a word to Mr. Habkirk to explain why she swatted at him. Plaintiff never told any coworker or supervisor about this incident (apx 133a-134a, 194a, 212a-217a, Garg, Tr, pp 591-592, Tr, pp 1350, 1354-

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1355). As further set forth in the argument below, there was no actual evidence or testimony that anyone, including Mr. Habkirk or plaintiff Sharda Garg herself, perceived this swatting by Sharda Garg of Mr. Habkirk to be opposition by Sharda Garg to sexual harassment, or "protected activity". (Mr. Habkirk did not even recall this alleged incident (apx 203a, Tr, p 1259).)

Plaintiff asserted that defendant Macomb County Community Mental Health Services retaliated against Ms. Garg for this 1981 "protected activity" beginning two years later, in 1983. Although plaintiff had received good reviews throughout her employment, she received her first less than favorable review from Mr. Slaine (both a personal friend and supervisor) in May of 1983. Thereafter, also in 1983, plaintiff did not receive a promotion for which she applied (apx 53a-57a, Garg, Tr, pp 114-118).

Plaintiff asserted that each of the 18 promotions or transfers she applied for but did not receive from 1983 through the time of trial were because of, and in retaliation by Mr. Habkirk for, her protected activity (the silent swatting of Mr. Habkirk in 1981). The only evidence plaintiff claimed to support this assertion of a causal relationship was that (1) Mr. Habkirk became "cold" to her after she swatted him, and (2) plaintiff's friend and supervisor, Mr. Slaine, allegedly stated to Ms. Garg's husband at a social event at some unspecified point between 1983 and 1995 that he believed plaintiff was not being promoted because Mr. Habkirk did not like her (a comment Mr. Slaine testified under oath he never made) (apx 58a, 68a, 70a, Garg, Tr, pp 122, 132, 134, apx 75a-77a, Slaine, Tr pp 363-365).

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The second theory of retaliation was claimed to arise out of plaintiff's act of filing a union grievance in 1987, in which she complained that she was denied two

promotions that year based on national origin discrimination by Mr. Kent Cathcart, a supervisor. This, plaintiff's third grievance over not receiving promotions, was filed after plaintiff already, and consistently, had not received 11 positions for which she had applied since 1983 (apx 44a-45a, 71a, 127a-128a, Garg, pp 137, 572-573). Plaintiff's counsel claimed that the retaliation for this 1987 grievance began two years later by the denial of Ms. Garg's next seven requests for promotion, from 1989 to 1997. (Plaintiff's counsel at the same time claimed this continued failure to obtain promotions was also due to retaliation for the 1981 swatting and/or because of national origin discrimination.)

Plaintiff's counsel also asserted that Ms. Garg was treated poorly or rudely by Mr. Cathcart and that this was in retaliation for her 1987 grievance, and/or in retaliation for her 1981 opposition to sexual harassment and/or because of national origin discrimination. Plaintiff conceded she could not provide any time frame within which these acts of alleged "harassment" by Mr. Cathcart occurred, other than her notes which referred to these events occurring in 1992, 1993, 1994 and 1995 (apx 50a-52a, 68a-70a, Garg, Tr, pp 104-106, 132-134).

As of November 1995, however, Mr. Cathcart was no longer in plaintiff's chain of command. At that point, Macomb County Community Mental Health Services had been reorganized and divided into geographical areas (North, South, Southwest). Life Consultation Center ("LCC"), where plaintiff had been working under the supervision of Mr. Cathcart was dissolved (apx 187a-189a, 193a, 194a-195a, Hoffman, Tr, pp 1132-1134, 1142, 1155-1156).

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Ms. Garg was moved to another facility called First North, and Mr. Cathcart was no longer Ms. Garg's supervisor, or in her chain of command. Plaintiff worked then with

new and different supervisors, including Messrs. Miller and Hoffman (apx 170a-172a, Griggs, Tr, pp 979, 980, 1000, apx 178a, Cathcart, Tr p 1062, apx 41a-43a, 72a-74a, 128a-129a, Garg, Tr, pp 61, 67-68, 181, 186, 193, 575-576).

Plaintiff also complained of supervisor rudeness (such as being assigned to an office next to the bathroom) after she moved to First North in 1995, under new supervisors (not including Mr. Cathcart). All this occurred more than five years after the 1987 grievance, and nine years after the 1981 alleged opposition to sexual harassment.

Summary Of Trial Proceedings

Trial commenced on March 27, 1998. Plaintiff's direct examination testimony took nearly five days (April 1-7), followed by several hours of cross-examination on April 7 and 8. Ms. Garg claimed she was as or more qualified than other applicants, and eligible for every job for which she had applied since 1983. This claim, however, was not supported by any other witness at trial, including Robert Slaine, a personal friend and supervisor, who was called by plaintiff. Mr. Slaine, when called by plaintiff, testified that plaintiff was not qualified for the positions for which she applied and did not receive, or if she was qualified by experience, she was ineligible under the union contract (e.g., apx 77a, 91a-93a, 99a-111a, Slaine, Tr, pp 401, 415-417, 446-458).

Plaintiff then called another supervisor, Margaret Demery, who testified to the legitimate business reasons for having given a job to plaintiff's coworker, and testified that she had no information that plaintiff had filed a union grievance (apx 136a-137a, Demery, Tr, pp 738-739). Plaintiff also called Deborah Milhouse-Slaine, who testified she had not been sexually harassed (apx 123a-125a, Tr, pp 510, 531-532).

Plaintiff also called Jan Hurst, a nurse. Ms. Hurst claimed that at an unspecified

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
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point in time, while staff were complaining about a psychiatrist who had given verbal orders for a medication which no one could understand because of his Indian accent, Mr. Cathcart commented that "these people have been here long enough, they ought to be able to speak good English" (apx 128a-152a, Hurst, pp 846-848, 850). Plaintiff also called Carmine Palmieri, a former coworker who, as union steward, had assisted in processing some of the grievances filed by plaintiff. Mr. Palmieri claimed to have heard Mr. Cathcart use a racially derogatory term "niggers" on a single occasion while in the bathroom sometime between 1984 and 1989 (apx 153a-162a, Palmieri, Tr, pp 873, 945).

Defendant's Witnesses And Theory

Given the vast scope of plaintiff's allegations--national origin discrimination, and/or retaliation for opposing sexual harassment, and/or retaliation for a grievance--covering a 17-year period (1981 to 1998), and plaintiff's unilateral, uncorroborated claim of being qualified for as many job applications--defendant was forced to call a multitude of coworkers and supervisors to establish legitimate business reasons for each promotion or transfer decision made, and to negate plaintiff's self-serving and unsubstantiated claims of mistreatment.

It was defendant's position, supported by the testimony of all witnesses at trial except Sharda Garg, that Sharda Garg was simply a mediocre employee who lacked initiative and supervisory experience or skills, and who also lacked experience with patient populations treated in many of the positions for which she applied.

Plaintiff worked almost exclusively with developmentally disabled adults, and had little experience with children or the mentally ill. She had (and had sought out) no

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
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ONE WOODWARD AVENUE
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supervisory responsibilities. These factors made plaintiff unqualified or less qualified than other applicants for many of the promotions or transfers for which she applied, which involved different patient populations or a need for supervisory skills or experience. Additionally, plaintiff, as a union member, simply was ineligible for some of the positions for which she applied due to the requirements of the union contract (see apx 77a-111a, Slaine, Tr, pp 401-417, 442-459, apx 137a, Demery, Tr, p 739, apx 156a-157a, Griggs, Tr, pp 973-974, apx 179a, Cathcart, Tr, p 1069, apx 190a-192a, Hoffman, Tr, pp 1136-1138, apx 201a-202a, Gipprich, Tr, pp 1226-1227).

Defense witnesses included Susan Griggs, who had been in plaintiff's chain of command and interviewed her, Kenneth Courtney, Program Director at First Southwest, Kent Cathcart, who explained his hiring decisions, Keith Hoffman, North Area Services Manager, Cheryl Haack, the Assistant Director of Personnel Labor Relations who represented the employer in Garg's grievance, Donald Kern, Executive Director at the Macomb County Community Mental Health Services from 1980 to 1990, Linda Gipprich, who made one of the selections challenged by plaintiff, William Israel, the Director of Human Resources, and Donald Habkirk, who had been in plaintiff's chain of command, and then became Executive Director of Community Mental Health in 1990, when he had replaced Mr. Kern.

Witness after witness denied discriminating or retaliating against plaintiff (apx 120a-122a, Slaine, Tr, p 472-474, apx 165a-166a, Griggs, Tr, pp 971-972, apx 176a-177a, Courtney, Tr, pp 1042-1043, apx 180a-181a, Cathcart, Tr, pp 1071-1072, 1079, apx 190a-192a, Hoffman, Tr, pp 1136-1138, apx 201a-202a, Gipprich, Tr, pp 1226-1227). Defendant also presented evidence that many, many other white employees

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who did not complain about harassment or discrimination were not promoted (apx 113a-119a, Slaine, Tr, pp 463-469).

Chronology

The following is a chronology of the jobs for which plaintiff unsuccessfully applied, the alleged protected activity, and the complained-of treatment beginning in 1992 by Kent Cathcart, and by other supervisors in 1995 (described in more detail in defendant's written motion for directed verdict, dated 4/10/98):

1978	Plaintiff begins employment at MCCHS
1981	Alleged opposition to sexual harassment by silent swatting
1983	Two years later plaintiff receives a less than favorable review
1983	Denial of application for DD Outpatient Therapist III; denial of application for Epilepsy Counselor; denial of application for Family Support Coordinator
1984	Denial of application for MI Children's Therapist III
1985	Denial of application for MI Adult Partial Day Therapist II; denial of application for Epilepsy Counselor
1985 or 1987	Denial of application for Emergency Services Liaison
1986	Denial of application for MI Children's Therapist II; denial of application for MI Children's Unit Supervisor - Therapist III
1987	Denial of application for DD Partial Day Services Unit Supervisor; denial of application for DD Outpatient Services Therapist III
1987	Grievance complaining of national origin discrimination
1989	Two years later, denial of application for DD Outpatient Therapist III; denial of application for DD Therapist III
1990	Denial of application for MI Adult Outpatient Therapist II
1992	Point at which three year statute of limitations would apply, absent discovery rule exception of Sumner v The Goodyear

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	Tire and Rubber Co.
1992-1995	Allegedly poor treatment by Mr. Cathcart
1994	Denial of application for DD Outpatient Therapist III
1995	Plaintiff moves to First North, away from Mr. Cathcart, with allegedly poor working conditions under different supervisors
1995	Denial of application for Program Supervisor
1995	Plaintiff files her complaint in this matter
1996	Denial of application for Program Supervisor - North Intake and Assessment Services
1997	Denial of Application for Crisis Stabilization Therapist II

Court of Appeals Opinion

In an unpublished opinion, Judges Griffin, Meter and Kelly affirmed the judgement of the trial court (apx 266a). As to each retaliation theory, the Court listed various pieces of evidence, concluding there was sufficient evidence to support both theories. Regarding the opposition to sexual harassment theory, the Court concluded that "reasonable jurors could conclude that plaintiff, by slugging Habkirk, sufficiently 'raise[d] the specter' that she opposed a violation of the civil rights act," and that "the different treatment plaintiff received after the slugging incident sufficed to establish causation." (Apx 267a-268a, opinion pp 2-3.)

Regarding the retaliation for grievance theory, the Court noted that plaintiff continued not to receive the promotions for which she applied after the grievance, that Mr. Cathcart had made racially disparaging comments twice regarding blacks, and once regarding Indians, and that plaintiff had offered evidence (albeit, solely her own uncollaborated testimony) that she was more qualified for the positions than those who

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ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
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received them (Id.).

The Court also rejected defendant's argument that plaintiff's claims of retaliation with regard to denials of promotions occurring more than three years before her lawsuit should have been barred by the statute of limitations (apx 268a-269a; opinion pp 3-4).

Supreme Court Proceedings

Defendant filed an application for leave to appeal and plaintiff filed an application for leave to appeal as cross appellee. By order of December 29, 2003 (apx 272a), oral argument was held before the Court on the applications on March 11, 2004. By order of April 15, 2004, (apx 273a) this Court granted leave, directing that the issues to be briefed include:

> (1) Whether plaintiff established a prima facie case regarding either of her two theories of retaliation, (2) whether a new trial is required because one of the theories submitted to the jury was unsupported by the proofs, (3) whether the continuing violations doctrine of Sumner v Goodyear Tire & Rubber Co, 427 Mich 505 (1986), should be preserved, modified, or abrogated in light of the language of the statute of limitations, MCL 600.5805(1), and the United States Supreme Court's decision in Nat'l Rail Passenger Corp v Morgan, 536 US 101 (2002), and (4) whether plaintiff received an award of future damages within the meaning of MCL 600.6013(1), thus barring prejudgment interest on that amount.

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ONE WOODWARD AVENUE
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48226-3499

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SUMMARY OF ARGUMENT

The evidence was insufficient to establish retaliation by Macomb County Community Mental Health Services from 1983 to 1997 against Sharda Garg for engaging in protected activity either because she allegedly "opposed sexual harassment" in 1981, "or" because she filed a charge or complaint about being discriminated against" in 1987 (apx 247a, verdict form). There was no testimony or evidence from which reasonable persons could find that Sharda Garg's act of "opposition" in 1981--silently swatting an individual who innocently tapped her shoulder in the hall, whom she only afterward discovered to be a supervisor, Mr. Habkirk--was intended by plaintiff to be, or was thereafter known by anyone else to be, opposition to sexual harassment, and thus protected activity. There was also no evidence from which a jury could conclude that Sharda Garg's swatting at Mr. Habkirk in 1981 was a proximate cause of the complained-of adverse employment actions which did not begin until two years later, and lasted the next 17 years.

There also was insufficient evidence to support plaintiff's second theory of retaliation, purportedly for filing a union grievance in 1987 complaining of national origin discrimination by supervisor Kent Cathcart. The proofs failed to show any causal relationship specifically between the grievance in 1987, and any adverse employment action--the continued denial of promotions beginning two years later in 1989, and allegedly poor treatment by supervisors beginning in 1992.

Alternatively, should the Court find there was sufficient evidence of retaliation based on one, but not both of these theories, a new trial is required because it cannot be determined from the verdict upon which theory the jury based its finding. Not only

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

did defendant unsuccessfully request a special verdict form which would have revealed the basis of liability, but this Court should not impose a requirement of a special verdict form to preserve what is already plainly preserved error where a motion for directed verdict has been properly made.

Even if the Court finds that either or both of plaintiff's retaliation theories were supported by the proofs, a new trial should nonetheless be granted because the vast majority of plaintiff's claims which the jury was permitted to consider were barred by the three-year period of limitations. The continuing violations doctrine of Sumner v Goodyear Tire & Rubber Co, 427 Mich 505 (1986), should be abrogated in light of the language of the statute of limitations, MCL 600.5805 or, at a minimum, modified in light of Nat'l Rail Passenger Corp v Morgan, 536 US 101 (2002), so as not to apply to discrete acts of retaliation, such as at issue here.

STANDARD OF REVIEW

The standard of review applicable to the trial court's denial of motions for directed verdict and judgment notwithstanding the verdict was summarized by the Court in Sniecinski v Blue Cross and Blue Shield of Michigan, 459 Mich 124; 666 NW2d 186 (2003):

> We review de novo the trial court's denial of both motions. Forge v Smith, 458 Mich 198, 204; 580 NW2d 876 (1998); Smith v Jones, 246 Mich App 270, 273–274; 632 NW2d 509 (2001). We "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." Wilkinson v Lee, 463 Mich 388, 391; 617 NW2d 305 (2000); Forge, supra at 204, quoting Orzel v Scott Drug Co, 449 Mich 550, 557; 537 NW2d 208 (1995). A motion for directed verdict or JNOV should be granted only if the evidence viewed in this light fails to establish a claim as a matter of law. Wilkinson, supra at 391; Forge, supra at 204.

A trial court's decision regarding a motion for summary disposition based on the

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

statute of limitations is reviewed de novo. Gladych v New Family Homes, Inc, 468 Mich 594; 664 NW2d 705 (2003).

ARGUMENT

I PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE AS TO EITHER OF HER TWO THEORIES OF RETALIATION FOR ENGAGING IN ACTIVITY PROTECTED BY THE CIVIL RIGHTS ACT, REQUIRING A DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT AS A MATTER OF LAW.

To establish a prima facie case of unlawful retaliation under the Civil Rights Act, MCL 37.2701, it is plaintiff's burden to show four specific elements, that

> (1) [S]he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. Polk v Yellow Freight System, Inc, 876 F2d 527, 531 (CA 6, 1989); see also Booker v Brown & Williamson Tobacco Company, 879 F2d 1304, 1310 (CA 6, 1989); Kroll v The Disney Store, Inc, 899 F Supp 344, 348 (ED Mich 1995). [DeFlaviis v Lord & Taylor, Inc, 223 Mich App 432; 566 NW2d 661 (1997).]

See also Peña v Ingham County Road Commission, 255 Mich App 299; 660 NW2d 351 (2003).

Plaintiff here failed to establish at least one of these elements with respect to both retaliation theories. The lower courts failed in their obligation to carefully, and objectively, consider the proofs to determine whether there was sufficient evidence which could support a rational, logical inference by the trier of fact of the existence of each of the elements of each of plaintiff's retaliation claims. While the Court of Appeals listed a plethora of evidentiary facts asserted to support each retaliation theory, that evidence did not support a reasonable inference, beyond speculation and conjecture, that plaintiff was not promoted or was treated poorly because of retaliation for protected activity.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

A. Plaintiff Failed To Establish A Prima Facie Case Of Retaliation For Her Alleged Opposition To Sexual Harassment In 1981, Where There Was No Evidence Of Opposition To Sexual Harassment, Of Knowledge By The Employer Of Opposition To Sexual Harassment, Or Of A Causal Relationship To Adverse Employment Actions Occurring Two To 14 Years Later.

The evidence was insufficient to establish retaliation by Macomb County Community Mental Health Services from 1983 to 1997 against Sharda Garg for engaging in protected activity because she allegedly "opposed sexual harassment" in 1981.

1. There was no evidence from which it could be concluded that Sharda Garg intended by the swatting incident to engage in protected activity/opposition to sexual harassment.

Plaintiff failed to establish the first element of a retaliation claim--that Sharda Garg engaged in a protected activity. DeFlaviis, supra. Plaintiff's counsel asserted that Mr. Habkirk "sexually harassed [other] female employees" when he snapped one employee's bra and pulled on another's underpants, and that plaintiff was engaged in protected activity when, in 1981, she "slugged him, forcefully opposing his practice of sexual harassment" (e.g. apx 255a, plaintiff's JNOV response brief, p 2). The evidence, however, in particular plaintiff's own testimony recounting events, did not support these inferences and assertions of counsel.

First, and most fundamentally, Sharda Garg never herself testified that, when she struck out in reflexive response to an innocent tap on the shoulder, she subjectively intended to oppose sexual harassment, or that she was even thinking about sexual harassment. Although asked, Ms. Garg could not and would not characterize the touching as improper. Plaintiff testified it was just a "touch" on her "shoulder," which she reflexively, automatically swatted away, before she knew who it was:

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

Q When you were being touched in the back, did you -- what was your impression whether there was something improper or proper being done?

A It was a very automatic reaction on my part. I felt somebody touching me, and I just turned around and swung at him. [Apx 65a, Garg, p 129.]

There was no basis in the evidence to conclude that this touching was or was perceived by Sharda Garg as improper, a sexual advance, rather than merely an attention getting device. Indeed, throughout trial, plaintiff's counsel repeatedly affirmatively represented that plaintiff herself was never sexually harassed (apx 231a-236a, closing at Tr 4/22/98, pp 66, 68-69, 74, 113-114). Plaintiff's counsel declared: "Let me be perfectly clear.... We are not saying that it was her belief that she was being sexually harassed. . ." (apx 144a-147a, argument on directed verdict motion at Tr, pp 807-810). Sharda Garg never testified she was, or believed herself to be, opposing sexual harassment when this occurred.

Second, any inference that plaintiff intended to oppose sexual harassment of other employees was foreclosed by the fact that plaintiff could not even establish that the two alleged incidents of sexual harassment occurred before plaintiff struck Mr. Habkirk. Although specifically asked to indicate whether incident with Mr. Habkirk occurred "before or after" the two incidents of alleged sexual harassment (the snapping of a bra, and the pulling of a panty), Sharda Garg could only say "it was around the same time." (See apx 62a-63a, Garg, Tr, pp 126-127.) Plaintiff could not possibly have been opposing acts of harassment by swatting her supervisor when she could not even recall whether those events had yet occurred when she acted!

Third, any inference that plaintiff intended to oppose sexual harassment by Mr. Habkirk was further prevented by the fact that plaintiff did not even know whom she

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

was slugging, and did so "reflexively," as one would when startled. Plaintiff testified she "automatically" swung around and knocked the hand away, and did not even know at whom she was reflexively swinging when she did so:

> Q Okay. How did you hit him?
>
> A I just went with my hand. You know, just--just swung it whoever it was behind me.
>
> Q Okay. And who did it turn out to be?
>
> A It turned out to be Mr. Habkirk. [Apx 63a, Garg, Tr, p 127.]***
>
> THE WITNESS: All I recall is his touching me from the back, my swinging at him. **I didn't know who was in behind me**, I just turned around and took a swing at him. [Apx 267a, Garg, Tr, p 130.]

As plaintiff did not know it was an alleged sexual harasser who was tapping her on the shoulder, and swung reflexively, she could not possibly have had the intent of opposing sexual harassment by so acting.

The Court of Appeals in its opinion lists these facts:

> Plaintiff sufficiently established a jury question with regard to these elements by way of her evidence, concerning the slugging incident, that (1) she had observed Habkirk pulling an employee's bra strap while walking behind her and pulling an employee's underwear elastic while seated behind her; (2) around the same time, in 1981, plaintiff was walking along a hallway when she felt somebody touching her back; (3) she turned around and swung at this person; (4) the person was Habkirk, one of her supervisors; (5) after the slugging incident, Habkirk became cold toward her; (6) a coworker told her that Habkirk did not like her; (7) plaintiff did not receive the first available promotion, in 1983, after the slugging incident, despite being qualified for the position; (8) plaintiff was denied eighteen total promotions between 1983 and 1997, despite being qualified for the positions; (9) individuals less qualified than plaintiff received promotions while plaintiff did not; and (10) Habkirk remained in her chain of command throughout the years. [Apx 267a.]

The Court, however, concludes, inexplicably, that "reasonable jurors could conclude that plaintiff, by slugging Habkirk, sufficiently 'raise[d] the specter' that she

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
TTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

opposed a violation of the civil rights act." (Apx 268a.) Defendant submits that these facts simply do not logically permit a leap to such a conclusion. Without evidence that Sharda Garg actually subjectively believed she was "opposing" (or even thinking about) perceived sexual harassment (of anyone), that she knew at whom she was swatting, or that the alleged harassment by Mr. Habkirk of other employees had yet even occurred, it is absolute, rank speculation to conclude that Sharda Garg was engaged in activity protected by the Civil Rights Act.

Under analogous circumstances, in Mitan v Neiman Marcus, 240 Mich App 679; 613 NW2d 415 (2000), the Court of Appeals affirmed the grant of summary disposition of a retaliation claim for the absence of sufficient evidence that the plaintiff ever engaged in protected activity under the Handicappers Civil Rights Act. In Mitan, plaintiff had complained to the employer that her supervisor had engaged in "job discrimination," but did not suggest that this "discrimination" was related to a protected attribute (there, her disability). Because plaintiff's complaint did not imply that she had opposed a violation of the Handicappers Civil Rights Act, the Court held that plaintiff had failed to show she was engaged in protected activity:

> Here, the evidence showed that plaintiff sent a written complaint to the human resources manager indicating that Jill Blake, her supervisor, had engaged in "job discrimination" because she would not allow plaintiff to participate in a sales promotion. While plaintiff's complaint mentioned that she accomplished numerous sales "during limited hours due to my physical disability," she did not suggest or imply that the alleged job discrimination was related to her disability. She sent a second written complaint indicating that Blake had engaged in "job harassment" because she had disputed whether sales plaintiff had made could be credited toward her total sales for another promotion and had called plaintiff a liar. However, because plaintiff's complaints did not state, imply, or raise the specter that plaintiff either opposed a violation of the HCRA or "made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing" under the act, this evidence does

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

not establish that plaintiff participated in a protected activity. [Mitan, supra.]

Likewise, there was no evidence from which a reasonable person could conclude that plaintiff was or believed herself to be engaged in protected activity when she reflexively swatted Mr. Habkirk for an inoffensive tap on the shoulder.

2. The employer could not possibly have known Sharda Garg had opposed sexual harassment and engaged in "protected activity," where plaintiff never told anyone, including Mr. Habkirk, that she was opposing sexual harassment when she silently, reflexively swatted away an inoffensive tap on the shoulder.

On the facts in evidence, it was impossible for a reasonable person logically to find the second element of a retaliation claim--that the employer knew that the employee was engaged in "protected activity", i.e., opposition to sexual harassment, when she swatted at Mr. Habkirk. DeFlaviis, supra. Sharda Garg conceded she told no one at Macomb County Community Mental Health that she had swatted at Mr. Habkirk or, more importantly, why she had done so. Plaintiff testified:

Q And that Mr. Habkirk came up behind you and touched you and you swung at him, correct?

A That is correct.

Q No words were spoken between the two of you, right?

A That is correct.

Q You remember anyone else being there?

A No.

Q You didn't report this to anyone, did you?

A No.* * *

Q Okay. All right. Did you report him to anyone?

A No.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

Q Did you file a grievance against him for doing that?

A No.

Q Did you report it to your union representative at that time?

A No, I did not do anything about it. [Apx 67a, Garg, Tr, p 131.]

* * *

Q Did you ever discuss this with Mr. Habkirk in his capacity in any way?

A No. [Apx 133a-134a, Garg, Tr, pp 591-592.]

Although Ms. Garg showed no hesitation in bringing grievances regarding other perceived discrimination, plaintiff never made any written or oral complaint about Mr. Habkirk or sexual harassment (see also apx 207a-208a, Garg, Tr, pp 1345-1355).

Given the evidence, how in the world was Mr. Habkirk himself, or anyone else, to know Sharda Garg was "opposing sexual harassment" when she silently and without explanation swatted at Mr. Habkirk in a hallway when he inoffensively tapped her on the shoulder? Plaintiff did not speak to Mr. Habkirk, and told no one else about the incident. There was nothing about the event itself (there was no evidence the shoulder tap was improper or itself harassment) which could have lead Mr. Habkirk to guess that plaintiff was "opposing sexual harassment."

As plaintiff has noted in briefing, silently physically rebuking or slugging a sexual harasser at the time of and in response to what likely is perceived by both individuals to be a sexually inappropriate contact or an act of sexual harassment may give rise to a reasonable inference of engagement in, or notice of engagement in, protected activity. However, that simply is not what occurred here.

As noted above, there was no evidence that the tap on the shoulder was or was

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

perceived to be improper or sexual in nature. There was no evidence this occurred after, or was in any way connected to, the two alleged, isolated "sexual harassment" incidents with other employees. Mr. Habkirk had absolutely no reason to know Sharda Garg was "opposing sexual harassment" when she silently swatted at him.

Finally, all promotion decisionmakers testified they did not know that plaintiff "opposed sexual harassment". Those at Macomb County Community Mental Health Service who had been involved in decisions regarding plaintiff's requests for promotion or transfer between 1983 and 1997 all testified they did not know plaintiff had "opposed sexual harassment". (While Mr. Habkirk was in the ultimate chain of command, he had no involvement in most of the promotion/transfer decisions.) Each and every witness testified that they had no knowledge of the swatting incident, or that plaintiff had opposed sexual harassment (apx 136a, Margaret Demery, Tr, pp 738, apx 165, 169a, Susan Griggs, Tr, pp 971, 976, apx 177a, Ken Courtney, Tr, pp 1043, apx 186a, Kent Cathcart, Tr, p 1079, apx 190a-192a Keith Hoffman, Tr, pp 1136-1138, apx 199a-200a, Donald Kern, Tr, pp 1207-1208, apx 202a, Linda Gipprich, Tr, p 1227, apx 75a, Slaine, Tr, p 331, apx 174a-175a, Bielenin dep, pp 22, 47-48). Mr. Habkirk himself had no recollection of this incident at the time of trial 17 years later (apx 203a, Habkirk, p 1259).

Given Sharda Garg's 14-year long silence, reasonable persons could not possibly find that this "swatting" incident was understood by anyone at Macomb County Community Mental Health Services (by Mr. Habkirk or anyone else) to have been protected activity, i.e., opposition to sexual harassment.

There was only speculation, and insufficient evidence to meet plaintiff's burden of proof on this second element of a retaliation claim.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

3. There was insufficient evidence of a causal connection between the alleged protected activity and the denial of promotions beginning more than two years later.

The only evidence claimed by plaintiff to show a retaliatory motive and causal connection to the denial of job promotions two to 17 years later, and relied upon by the lower courts here, was (1) plaintiff's testimony that while Mr. Habkirk had been "cordial," he became "cold" toward her after she hit him, and (2) plaintiff's claim that at an unidentified point in time, Robert Slaine (a friend and supervisor) told plaintiff's husband at a social event that it was his "opinion" that plaintiff was not being promoted because Mr. Habkirk "did not like her" for a never explained reason (apx 58a, 68a, 70a, Garg, Tr, pp 122, 132, 134).[3]

This evidence is insufficient to support a finding of a causal connection. First, while plaintiff perceived that Mr. Habkirk became "cold" to her after the swatting incident in 1981, there is no basis in evidence or common sense that this coldness was because of the protected nature of her conduct. There was also no evidence for how long this "coldness" was perceived by Ms. Garg, and no direct evidence that it had any role in the denial of a promotion for which she applied beginning two years later in 1983, or in those which she was thereafter denied for the next 14 years.

Likewise, Mr. Slaine's subjective opinion expressed at some unknown point over the next 14 years that Mr. Habkirk did not "like" plaintiff, was insufficient to establish an inference that Mr. Habkirk did not like plaintiff because of her engagement in protected activity in 1981. This is particularly so in light of the testimony from all witnesses involved in promotions and transfer decisions regarding Ms. Garg testified that Mr.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

[3] Mr. Slaine unequivocally denied making this comment (apx 75a-77a, Tr, p 363-365).

Habkirk did not involve himself in these decisions. (Apx 121a-122a, Slaine, Tr, pp 473-474, apx 138a, Margaret Demery, Tr, p 746, apx 163a, Susan Griggs, Tr, pp 967, apx 176a, Ken Courtney, Tr, p 1042, apx 186a Kent Cathcart, Tr, p 1079, apx 199a, Donald Kern, Tr, pp 1207, apx 202a, Linda Gipprich, Tr, p 1227, apx 173a-174a, Bielenin dep, 21-22, apx 190a, Hoffman, Tr, p 1136). This was confirmed by Donald Habkirk himself (apx 204a, Habkirk, Tr 4/14/98, pp 1260).

In Feick v County of Monroe, 229 Mich App 335; 582 NW2d 207 (1998), the Court of Appeals affirmed the grant of summary disposition on a retaliation claim for a similar absence of evidence of causation. Plaintiff, a former chief prosecuting attorney, alleged that defendants retaliated against her for filing a complaint with the Equal Employment Opportunity Commission by terminating her and not subsequently re-hiring her for various positions. Holding that there was insufficient evidence of a causal link as a matter of law, the Court reasoned:

> Plaintiff's retaliation claim fails because she presented no evidence from which a reasonable fact-finder could infer that there was a causal connection between her EEOC complaint and defendant's adverse employment actions. Kocenda v Detroit Edison Company, 131 Mich App 721, 726; 363 NW2d 20 (1984); see also Parnell v Stone, 793 F Supp 742, 746 (ED Mich 1992) aff'd 12 F3d 213 (CA 6, 1993). The only evidence plaintiff presented was that Swinkey testified at deposition that he was not pleased that plaintiff had filed an EEOC complaint and that he had talked about the complaint to one other person. This was insufficient to establish a causal link between plaintiff's EEOC complaint and the adverse employment actions. The circuit court properly dismissed plaintiff's retaliation claim for failing to establish that a genuine issue of material fact remained regarding whether defendants retaliated against her for filing her discrimination complaint. [Feick, supra.]

Likewise here, plaintiff failed to present evidence establishing any causal connection between "protected activity" in her silent swatting of Mr. Habkirk in 1981 and the denial of promotions beginning in 1983.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

Under an analogous failure of proof, the court in Maynard v City of San Jose, 37 F3d 1396, 1405 (CA 9, 1994), vacated a judgment for plaintiff. While plaintiff there established that the defendants responsible for the adverse employment action were angry at her, there was no evidence that they were angry or acted because of her protected activity. The court reasoned:

> [W]hile there is evidence that Daniels, Atkison, and Jackson retaliated against Maynard, there is an absence of evidence that this retaliation occurred because Maynard assisted a black person. The record reflects instead that they were angry and embarrassed that Maynard had publicly exposed the post-dated letter.

Likewise here there was no evidence that if Mr. Habkirk disliked plaintiff, he disliked her because of protected activity by her, i.e., because he believed she had opposed sexual harassment when she swatted him.

Additionally, the two to 14 year lapse in time between the alleged protected activity/opposition to sexual harassment by silent swatting, and the adverse employment action further negates any causal connection. From the time of the silent slugging in 1981, until 1983, plaintiff received all very good evaluations (Tr, pp 116-117). It was not until 1983, two years after the silent swatting and after plaintiff's first less than favorable evaluation, that plaintiff claimed the first "retaliation" or adverse employment action occurred when she was denied a promotion.

Time and time again the federal courts have held the such a temporal lapse as existed here between the protected activity, and the much later alleged retaliatory employment does not permit an inference of causation. In Clark County School District v Breeden, 533 US 972 (2001), the Supreme Court reinstated summary judgment on a retaliation claim under Title VII. Holding that a 20-month delay between the alleged

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

protected activity and the retaliation was insufficient to support a finding of a causal relation, the Supreme Court approved of and followed decisions holding that a delay of even several months between the activity and the retaliation is insufficient to establish causation:

> The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that temporal proximity must be "very close," [citations omitted]. Action taken (as here) 20 months later suggests, by itself, no causality at all.

Similarly, the delay of two or more years after the alleged protected activities here is insufficient to establish causation. See also decisions by the Courts of Appeals applying these principles even before Breeden. Oliver v Digital Equipment Corp, 846 F2d 103 (CA 1, 1988) (affirming summary judgment for absence of a prima facie case of retaliation where there was a 33-month gap between the filling of an EEOC complaint and the employee's discharge); King v Town of Hanover, 116 F3d 965 (CA 1, 1997) (summary judgment affirmed where only evidence of retaliation was that employee was disciplined five months after his complaint to a supervisor about sexual harassment); Mesnick v General Electric Co, 950 F2d 816 (CA 1, 1991) (summary judgment affirmed where nine month delay between EEOC complaint and termination negated inference of retaliation); Hughes v Derwinski, 967 F2d 1168 (CA 7, 1992) (summary judgment affirmed where four-month gap between filing of administrative complaint and disciplinary letter and three-year gap between filing of complaint and termination not sufficiently related to show retaliation); Feltmann v Sieben, 108 F3d 970 (CA 8, 1997), cert den 118 S Ct 851 (1998) (reversing a judgment for plaintiff and directing the entry of judgment notwithstanding the verdict for the reason that the fact of termination six

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

months after an incident is by itself insufficient to support a claim of causal connection); Candelaria v EG & G Energy Measurements, Inc, 33 F3d 1259 (CA 10, 1994) (evidence was insufficient as a matter of law to support trial court's factual finding of retaliation, because adverse employment actions in 1981 were not in "sufficiently 'close temporal proximity'" to plaintiff's 1978 complaint to support an inference of retaliatory motive).

Each among this plethora of decisions graphically demonstrates that a two to 14 year lapse between the alleged protected activity and the adverse employment action/retaliation negates any inference of causation. In such a case there simply is no evidentiary basis upon which to find the adverse employment action to be retaliation because of the temporally distant alleged protected activity.

B. Plaintiff Failed To Establish A Causal Connection Between A Grievance In 1987 Complaining Of National Origin Discrimination, And The Continued Denial Of Promotions Beginning In 1989, Or Alleged Poor Treatment By Supervisors Beginning In 1992.

Plaintiff did not receive 11 promotions or transfers for which she applied between 1983 and 1987. During that time, plaintiff filed three unsuccessful grievances alleging that she was improperly denied these promotions. Plaintiff filed one grievance in 1985, and two more grievances in February and June of 1987. Plaintiff complained of national origin discrimination (by a supervisor, Kent Cathcart) only in the third grievance, that brought in June of 1987. That grievance challenged plaintiff's failure earlier in 1987 to get a job obtained by Margaret Porkka. The grievance was denied at the first level, and not pursued further by plaintiff (apx 44a-1-45a, 71a, 126a-127a, Garg, Tr, pp 70-78, 137, Tr, pp 572-573). Thus, there never resulted any finding or outcome from that grievance adverse to Mr. Cathcart.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

Plaintiff's counsel asserted at trial that the continued denial of Sharda Garg's next seven requests for promotion beginning two years later in 1989 and occurring until 1997, were in retaliation by Mr. Cathcart for the allegations of discrimination in the third grievance in 1987 (or because of national origin discrimination or in retaliation by Mr. Habkirk for opposing sexual harassment in 1981). Plaintiff, however, produced no direct or circumstantial evidence of a causal connection between her inclusion in her third union grievance in 1987 of a complaint of national origin discrimination by Mr. Cathcart, and subsequent adverse employment actions occurring between two and ten years later.

The factors listed by the Court of Appeals do not support a rational inference of a causal relation between the grievance and the continued denial of promotions.

The Court of Appeals stated:

> With regard to the second retaliation theory, plaintiff sufficiently established the elements of a retaliation claim by way of her evidence that (1) plaintiff filed a grievance alleging racial discrimination in June 1987; (2) Cathcart, a supervisor, knew about the grievance; (3) after filing the grievance, plaintiff failed to receive the next promotion that she sought, posted in December 2, 1988, despite being qualified for the position; (4) plaintiff failed to receive seven total promotions between 1989 and 1997, despite being qualified for the positions; (5) individuals less qualified than plaintiff received promotions while plaintiff did not; (6) in 1994, plaintiff was transferred to a windowless office from which she could hear noises emanating from the adjacent bathroom, while persons less senior to plaintiff received better offices; (7) in 1996, Cathcart made a statement disparaging to blacks; (8) Cathcart made another comment disparaging to Indians; (9) Cathcart reprimanded plaintiff but not others for minor infractions; (10) Cathcart ignored plaintiff in staff meetings and treated her poorly in the hallways; (11) in 1984 or 1985, Cathcart used the work "n----" in referring to blacks; and (12) Cathcart remained in plaintiff's chain of command through the years. [Apx 268a.]

As the Court of Appeals notes, Mr. Cathcart, who was plaintiff's supervisor from 1986 until 1995 (when plaintiff moved to First North under different supervisors),

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
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obviously knew about the 1987 grievance. However, there was no direct or circumstantial evidence whatsoever that Mr. Cathcart was upset, angry or in any way concerned or bothered **by** the 1987 grievance. There was no evidence of any statement by Mr. Cathcart (or anyone else) about or critical of that particular (unsuccessful) grievance, or more specifically about the protected activity in that grievance--the complaint therein of national origin discrimination, in particular. Indeed, the only comment by Mr. Cathcart regarding the grievance testified to by Mr. Palmieri, the union steward who met with Mr. Cathcart regarding the grievance, was Mr. Cathcart's expression of surprise that plaintiff had even applied for the position which was the subject of the grievance, because Mr. Cathcart believed her experience was not adequate compared to other applicants (apx 159a-160a, Tr, pp 883-884, 888).

The June 1987 grievance was just one of many grievances routinely filed by union members over the failure to obtain a requested promotion, and the third filed by Sharda Garg herself (apx 44a-45a, Garg, Tr, pp 70-78, 182, apx 195a-198a, Haack, Tr, pp 1187-1190). Mr. Carthcart denied that he had ever retaliated against plaintiff for filing any grievance, or because of her national origin or skin color. He testified he could not even recall whether Ms. Garg had claimed in one of her grievances that she had been discriminated against based on her national origin (apx----Cathcart, Tr, pp 1075-1080). (Ms. Garg herself had trouble keeping her grievances straight, noting that her recollection "blurred" because there were so many, Garg, Tr, p 574). There was, simply, no evidence that Sharda Garg's engagement in protected activity "was a matter of any consequence" to Mr. Cathcart (or anyone else). West v Gen Motors Corp, 469 Mich 177; 665 NW2d 468 (2003).

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

The Court of Appeals' rationale--"that plaintiff was denied *the first promotion that she sought after the filing of the grievance"* (emphasis by Court of Appeals, apx 268)--is patently defective. First, as this Court recently declared in West, supra, in holding there to be insufficient evidence of causation in a whistleblower case, "Relying merely on a temporal relationship is a form of engaging in the 'logical fallacy of post hoc ergo propter hoc (after this, therefore in consequence of this)' reasoning." West, n 10.

More critically, while plaintiff was denied the first promotion requested after the grievance, she had also been denied all promotions before the grievance! There was no evidence to circumstantially point to retaliation by Mr. Cathcart for the second 1987 grievance as an explanation for Sharda Garg's continued failures to secure promotions. The denial of promotions was nothing new--there was absolutely no evidentiary basis to conclude that the denials of seven requested promotions after the 1987 grievance, was because of the third grievance rather than for the same deficiencies which lead to the denial of the 11 requested promotions before that time. Plaintiff had been denied promotions due to her own inadequacies since 1983. There was no evidence that Ms. Garg's capabilities or qualifications changed after the grievance in 1987. There was no basis in logic or evidence to connect the 1989 denial of a promotion to the 1987 grievance, rather that the same failings which had prevented Sharda Garg from being promoted since 1983.

The lower courts suggested that a causal connection was shown between the grievance and plaintiff's continued loss of promotions because plaintiff was "harassed" by Mr. Cathcart and others in the years after the grievance. However, there was no showing that these acts of "harassment" either occurred because of the grievance, or at

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

a point sufficiently close in time to the grievance, to support any inference of a causal connection. Plaintiff conceded she could not provide any time frame within which these acts of alleged "harassment" by Mr. Cathcart occurred, other than her notes which referred to these events occurring in 1992, 1993, 1995 and 1995. This, however, was at least five to eight years after the grievance (apx 50a-52a, 68a, 70a, Garg, Tr, pp 104-106, Tr, pp 132-134).

Further, the alleged acts of "harassment" by Mr. Cathcart, were never to be shown of such a nature as to be related to the grievance. These instances of unpleasantness included things like Mr. Cathcart telling plaintiff not to leave her work to look at a rainbow, and reprimanding her once for being late for work (apx 46a-49a, Garg at Tr, pp 94-97). Such trivial instances clearly fail to establish any such causal connection. They are "insufficiently serious" to support an inference of retaliatory intent. See Feltmann, supra.

On the other hand, there also was no evidence that these incidents of unpleasantness occurred only after and thus, inferentially because, Mr. Cathcart became aware of the grievance. Plaintiff complained generally that she did not get along with Mr. Cathcart (see Tr, pp 94-100). There was no testimony that this began only after the grievance was filed, or that something changed in the way Mr. Cathcart treated plaintiff after the grievance. Moreover, negating any inference that Mr. Cathcart did not like plaintiff because of the grievance is the fact plaintiff received good evaluations while Mr. Cathcart was in her chain of command, and after the grievance had been filed (apx 132a, Garg, Tr, pp 589, 1364). He also "went to bat" for her regarding flex-time (apx 130a-131a, Garg Tr, pp 577-579).

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

Events (alleged poor treatment by supervisors Miller and/or Hoffman, being given an office adjacent to the bathroom, and denial of promotions) occurring after the 1995 reorganization when plaintiff moved to First North, where Mr. Cathcart was no longer in her chain of command[4] have no logical or demonstrated connection to Mr. Cathcart, or, more specifically, to the 1987 grievance

Evidence, relied upon by the Court of Appeals, that during the 10 years he was in plaintiff's chain of command (1984 to 1995), Mr. Cathcart twice made a disparaging remark about African Americans, and twice made a comment disparaging to Indian physicians, was not sufficient to allow an inference of a causal connection between the 1987 grievance complaining of national origin discrimination, and plaintiff's continued inability in and after 1989 to obtain promotion or transfer. At most, these were merely "stray remarks", Sniecinski v Blue Cross and Blue Shield of Michigan, 469 Mich 124; 666 NW2d 186 (2003), not evidencing a causal relationship between the grievance and the decision not to promote.

The four alleged comments (which Mr. Cathcart denied making) were: (1) a comment approximately nine years before trial critical of an Indian physician's accent, made in the context of receiving complaints from staff that the physician's accent made his verbal instructions regarding medications to be given incomprehensible; (2) a comment, date unspecified, to Ms. Garg when she noted her son was admitted to a medical program, that "I don't know how many Indian doctors we need;" (3) a comment,

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[4] In this regard, the Court of Appeals is incorrect in stating, in its 12th point, that "Cathcart remained in plaintiff's chain of command throughout the years." Mr. Cathcart was not in plaintiff's chain of command after 1995, although plaintiff continued not to receive promotions. (apx 170a-172a, Griggs, Tr, pp 979, 980, 1000, apx 178a, Cathcart,

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
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(313) 965-7900

date unspecified, that he would not have hired an African American nurse, Jan Hurst (as he actually did), had there been a white applicant; and (4) a comment in 1984 or 1985 in the context of "guys talking in the john and stuff" that there were no "niggers" where he grew up or working in Community Mental Health. (Apx 149a-152a, Hurst, Tr, p 847-850, Apx 47a-48a, Garg, Tr, p 95-96, 271, apx 153a-158a, Palmieri Tr, pp 871-876.)[5]

As this Court noted in Sniecinski, the factors to be considered in determining whether comments are merely stray remarks not probative of intent or a causal relation are:

> (1) whether they were made by a decision maker or an agent within the scope of his employment; (2) whether they were related to the decision-making process; (3) whether they were vague and ambiguous or clearly reflective of discriminatory bias; (4) whether they were isolated or part of a pattern of biased comments, and (5) whether they were made close in time to the adverse employment decision. Cooley v Carmike Cinemas, Inc, 25 F3d 1325, 1330 (CA 6, 1994); Krohn v Sedgwick James, Inc, 244 Mich App 289, 292; 624 NW2d 212 (2001). [Sniecinski, 136, n 8.]

The four comments attributed to Mr. Cathcart over a ten-year period between 1984 and 1995 were stray remarks not probative of a causal relation between continued denial of promotions/alleged poor treatment of Sharda Garg and retaliation for her June 1997 grievance. Two comments dealt with bias or insensitivity against African Americans (which Ms. Garg is not). The other two comments were specifically related to Indian physicians (while Indian, Ms. Garg was not a physician).

None of the comments had any relation to the decision making process regarding

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Tr p 1062, apx 41a-43a, 72a-74a, 128a-129a, Garg, Tr, pp 61, 67-68, 181, 186, 193, 575-576).

[5] Although the Court of Appeals in its opinion references a comment by Cathcart in 1996 disparaging to blacks, defendant is unable to identify this anywhere in the proofs; Mr. Cathcart would no longer have been in plaintiff's chain of command at this point, as plaintiff moved to First North with new and different supervisors in 1995.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

promotions, or Sharda Garg; indeed the jury found that Ms. Garg was not discriminated against by Mr. Cathcart based on her national origin!

None of the comments in substance had any relation to the grievance. None of the comments was indicative of bias or intent to retaliate because of a complaint of national origin discrimination in the grievance.

The comments were clearly isolated, four over a ten-year period. None was shown to have been made close in time either to the grievance or to the subsequent denials of promotion.

Further, the evidence affirmatively established that none of the interviewer/decisionmakers involved in the promotion decisions subsequent to the grievance even knew about the grievance, other than, of course, Kent Cathcart (apx 736a, Demery, Tr, p 738, apx 164a, Griggs, Tr, p 970, apx 177a, Courtney, Tr, p 1043, apx 191a-192a, Hoffman, Tr, p 1137-1138, apx 192a, Gipprich, Tr, p 1138).

This Court's decision in West v General Motors Corp, 469 Mich 177; 665 NW2d 468 (2003), provides further support for defendant's position that plaintiff here failed to establish a prima facie case of retaliation. In West, plaintiff alleged he engaged in activity protected by the Whistleblower's Protection Act when he made a police report on May 4, 1997, regarding an alleged assault by a coworker. Plaintiff characterized one supervisor as nonchalant when being advised he had made a report, and the other as appearing "upset" that the altercation had occurred.

On May 22, 1997, plaintiff in West overstated his overtime, for which he was disciplined in June, 1997. In October 1997, plaintiff again overstated his overtime for which he was terminated in January 1998. He then filed a Whistleblower's suit claiming

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

that after the police report he was treated differently by his supervisors and retaliated by the discipline and termination.

The Court's analysis in concluding that plaintiff in West failed to come forth with evidence supporting the causation element of his whistleblower claim applies with even greater force to the record in this matter. As with Sharda Garg's retaliation claim in this matter, there "is nothing more than pure conjecture and speculation to link plaintiff's [pursuing a grievance based on, inter alia, national origin discrimination in 1987] to any subsequent adverse employment action." West, 188. Here, as in West, to "prevail, plaintiff had to show that [her] employer took adverse employment action because of plaintiff's protected activity, but plaintiff has merely shown that [her] employer [continued to fail to promote or harassed her years] after the protected activity occurred." West, 185.

Moreover, the facts here stand in contrast to West, where, as noted by Justice Kelly, the plaintiff had a near perfect employment record and the employer had taken no action until after the whistleblowing/protected activity. Sharda Garg before this 1987 grievance (her third), consistently had been denied all prior 11 requested promotions or transfers over the past six years.

Plaintiff relied on nothing more that speculation and conjecture to support her claim that she continued not to receive promotions because of her June 1987 grievance. In a claim under the Civil Rights Act, as in other tort actions, "[m]ere speculation or conjecture is insufficient to establish reasonable inferences of causation. Skinner v Square D Co, 445 Mich 153, 164; 516 NW2d 475 (1994)." Sniecinski, 140. A conjecture is simply an explanation consistent with known facts or conditions, but not

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

deducible from them as a reasonable inference. Kaminski v Grand Trunk W R Co, 347 Mich 417, 422; 79 NW2d 899 (1956). Even assuming the 12 evidentiary facts cited by the Court of Appeals were consistent with a conclusion that Mr. Cathcart had retaliated against Sharda Garg because of the 1987 grievance, that conclusion is not deducible from them as a reasonable inference. While those facts may have shown Mr. Cathcart to be insensitive, they had nothing to do with the grievance.

The lower courts erred in refusing to direct entry of a directed verdict as to both of these retaliation theories or judgment notwithstanding the verdict. These claims asserted by counsel were without sufficient evidentiary support to permit a finding of all four elements of a retaliation theory.

II ALTERNATIVELY, A NEW TRIAL IS REQUIRED BECAUSE OF THE SUBMISSION TO THE JURY OF AT LEAST ONE THEORY OF RETALIATION LIABILITY WHICH WAS UNSUPPORTED BY THE PROOFS, AND AS TO WHICH A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

The jury found retaliation with respect to some or all 18 job promotions or transfers, because plaintiff "opposed sexual harassment or because she filed a charge or complaint about being discriminated against." (Apx 247a, verdict form, emphasis added.) As set forth in argument I above, defendant submits that there was insufficient evidence to support either of these theories, requiring judgment notwithstanding the verdict.

If, however, the Court disagrees in part, and finds there was sufficient evidence of retaliation based on one, but not both of these theories, a new trial is required. Both retaliation theories and the claimed improper denial of all 18 promotions went to the jury here, notwithstanding defendant's motion for directed verdict. This is an error which requires the grant of a new trial.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
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ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

Michigan's appellate courts on numerous occasions have held that a new trial is required where, as here, a case is submitted to the jury on several theories of liability, one of which is not properly in the case. Where it cannot be determined from the verdict upon which theory the jury relied, reversal and a new trial is required. Funk v General Motors Corp, 392 Mich 91, 110-111; 220 NW2d 641 (1974) ("We are not persuaded that the imposition of enterprise responsibility on this owner, qua owner, is justified and, therefore, order a new trial as to General Motors because, although the jury could have properly returned a verdict against General Motors on the basis of its exercise of retained control, the jury may have found against General Motors as owner on the alternative theory of liability which should not have been submitted."), Leonard v Farmers' Mutual Ins Co of Monroe and Wayne Counties, 192 Mich 230 (1916), Rancour v Detroit Edison Co, 150 Mich App 276, 289 n 2 and accompanying text; 388 NW2d 336 (1986) ("The general verdict of the jury makes it impossible to determine whether the verdict was based on the failure to accommodate theory or on the discrimination theory. Thus, remand for a new trial is necessary. See People v Long (On Remand), 419 Mich 636, 649; 359 NW2d 194 (1984)"), Berwald v Kasal, 102 Mich App 269; 301 NW2d 499 (1980).

In Tobin v Providence Hospital, 244 Mich App 626; 624 NW2d 548 (2002), holding that the trial court's erroneous denial of a directed verdict as to one of several claimed breaches in a medical malpractice action required reversal and a new trial, the Court reasoned:

> Defendant was therefore entitled to dismissal of the claim of malpractice predicated on the failure to monitor and record the decedent's temperature before, during, and after the transfusion. Because the jury was not asked to make a distinct determination with respect to each theory of malpractice

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
TTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

> alleged by plaintiff, it is impossible to know if the jury rejected the other theories advanced by plaintiff and rendered judgment based on this improperly submitted theory. "'[A] general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it.'" Sahr v Bierd, 354 Mich 353, 365; 92 NW2d 467 (1958), quoting Sunderland, Verdicts, general and special, 29 Yale L J 253, 259 (1920). Therefore, the trial court committed error requiring reversal and a new trial in failing to grant defendant's motion for a directed verdict and in permitting plaintiff to present evidence regarding this issue in her rebuttal case.

Federal courts likewise hold that reversal and remand for a new trial is required where one of two theories of liability erroneously was submitted to a jury. United NY and NJ Sandy Hook Pilots Ass'n v Halecki, 358 US 613, 619 (1959) (reversing a general verdict and ordering a new trial because one of two theories of liability submitted to the jury was invalid and there was "no way to know that the invalid [theory] was not the sole basis for the verdict"), Virtual Maintenance Inc v Prime Computer, Inc, 11 F3d 660 (CA 6, 1992) ("Because the jury returned a general verdict when one of the theories of liability was legally incorrect, we must reverse").

Despite these authorities and longstanding principles, one panel of the Court of Appeals, in Zdrojewski v Murphy, 254 Mich App 50; 657 NW2d 721 (2002), has suggested that where the jury returns a general verdict, reversal for the erroneous denial of a motion for partial directed verdict will not be had where the defendant did not request a special verdict to delineate between theories. The Court held this to be the case in Zdrojewski, at least where the other findings on the verdict (there future damages) reflected that jury found liability based on the other theories which were supported by the proofs.

First, Zdrojewski has no factual applicability here. Macomb County Community Mental Health did in fact request a special verdict form specifically delineating between

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

each of the three theories of liability asserted by plaintiff (discrimination, retaliation for grievance, and retaliation for opposing sexual harassment) (as well as between future and past, economic and noneconomic damages). The trial court, however, declined to give such a lengthy verdict form, electing instead to give the truncated version upon which the jury ultimately returned its verdict (apx 28a-32a defendant's proposed special verdict form, questions 1, 3, and 6, apx 221a-222a, Tr 4/28/98, pp 11-12, apx 250a, 8/6/98 opinion acknowledging regret at this decision). Zdrojewski is also inapposite because there was here no basis in the evidence, verdict, or damage award, upon which to conclude that the verdict was likely based on one theory of retaliation rather than the other.

Defendant submits that in any event, this Court should reject a rule which would require a special verdict form delineating between various claims or theories of liability in order to preserve a claim of error based upon the denial of a partial directed verdict. First, such a requirement is contrary to longstanding principles of Michigan jurisprudence, and inconsistent with MCR 2.514 which places within the discretion of the trial court the decision of whether to require a special verdict.

Further, it is the obligation of the trial court on a properly made motion for directed verdict to study the proofs carefully to determine what theories are and are not cognizable under the proofs. The consequence of allowing an unsupported theory to go to the jury is not just that the jury will premise liability solely upon that theory, but also that the defendant is subjected to the prejudice inherent in allowing evidence of other bad acts to remain before the jury. See Berwald v Kasal, supra. It is imperative to a fair trial that where the evidence is insufficient to allow impose liability the jury be so advised

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

and the claim be removed from the jury's consideration in advance of deliberations.

Moreover, in many cases (such, as found by Judge Olzark, this one) a special verdict delineating between multiple theories or claims would be burdensome, confusing to the jury, and in many cases simply unworkable. This is particularly so given the many special findings already required of Michigan juries by the Legislature in personal injury actions. See MCL 600.6305 (requiring specific, separate findings as to past economic and noneconomic damages, future medical damages, other future economic loss, future noneconomic loss, all specific to the periods in which they will accrue), MCL 600.6304 (fault allocation between parties and nonparties).

Where there are numerous theories, a special verdict delineating among them often would be unworkable. In medical malpractice actions against a hospital, for example, there may be asserted not merely one or two, but a plethora of breaches by multiple agents and/or the corporation itself; to require a jury to make specific findings as to each breach, and potentially specifically as to causation as to each, to preserve error in the denial of a motion for directed verdict made would as to each, would impose an impossible burden on court and counsel to come up with a comprehensible verdict form objectively characterizing for the jury the multitude of theories.

The trial court and parties may determine that a special verdict breakdown will be helpful to the trial and conduct for case. However, the requirement of a special verdict form should not be made a necessary prerequisite to preserve error in the denial of a proper motion for directed verdict.

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

If this Court determines that only one of these two retaliation theories was unsupported by the proofs (for the reasons set forth in argument I above), such that a

directed verdict should have been granted as to that theory, the submission of that theory requires a new trial.

III ALTERNATIVELY, THE CONTINUING VIOLATIONS DOCTRINE OF SUMNER V GOODYEAR TIRE & RUBBER CO, 427 MICH 505 (1986), SHOULD BE ABROGATED IN LIGHT OF THE LANGUAGE OF THE STATUTE OF LIMITATIONS, MCL 600.5805(1) OR, AT A MINIMUM, MODIFIED IN LIGHT OF NAT'L RAIL PASSENGER CORP V MORGAN, 536 US 101 (2002), AND A NEW TRIAL GRANTED TO DEFENDANT.

Even if the Court finds that either or both of plaintiff's retaliation theories were supported by sufficient proof, a new trial should nonetheless be granted because the vast majority of plaintiff's claims which the jury was permitted to consider were barred by the plain language of the three-year period of limitations. MCL 600.5805(1) and (9). Plaintiff should not have been permitted to assert claims under either retaliation theory based on the denial of promotions or transfers more than three years before suit was filed--before July 21, 1992. A new trial should be granted, in which the jury's determination as to liability and damages is confined to the loss of promotions after July 21, 1992.

A. The Continuing Violations Doctrine Of Sumner v Goodyear Tire & Rubber Co Should Be Abrogated In Light Of The Language Of The Statute Of Limitations.

An action for employment retaliation or discrimination under the Civil Rights Act must be brought within three years after the cause of action accrued. MCL 600.5805, Mair v Consumers Power Co, 419 Mich 74, 77-78; 348 NW2d 256 (1984). MCL 600.5805(1) and (9) provide that a person shall not bring an action to recover damages for injuries. . .after the claim first accrued" unless the action is commenced within three years:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

accrued . . . the action is commenced within the periods of time prescribed by this section.* * *

(9) The period of limitations is 3 years after the time of death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

A "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827.

As to wrongs occurring more than three years before this suit was filed on July 21, 1995--the denial of promotions and transfers from 1983 to July 21, 1992--plaintiff's claims of retaliation were time-barred by the plain language of the statute. The continuing violations doctrine applied in Sumner v The Goodyear Tire and Rubber Company, 427 Mich 505; 398 NW2d 368 (1986), is inconsistent with the statutory directive and should be abrogated.

In Sumner, the Court adopted from the federal courts, in their application at that time of Title VII of the Federal Civil Rights Act, the doctrine of "continuing violation" as a common law doctrine to avoid strict application of the statute of limitations for discrimination claims. Sumner, 526-527. The doctrine is similar to the discovery rule, in extending the time to commence an action where an employee may not have realized that discrimination or a civil rights violation may have occurred. Sumner, 528-529, n 8. "It is properly applied where the employee, by the actions of the employer or due to other circumstances, is denied notice of the discriminatory act or is, in some other way, prevented from making a timely filing." Id.

However, application of the continuing violations doctrine in Sumner to disregard the plain language of MCL 600.5805, and allow a claim to be brought three to 12 years after the accrual/wrong (denial of promotion/transfer), is contrary to those fundamental

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

principles of statutory construction as recently re-embraced by this Court in Morales v Auto Owners Ins Co (After Remand), 469 Mich 487; 672 NW2d 849 (2003). In refusing to judicially "toll" or suspend judgment interest during appeal as not contemplated by the plain language of the judgment interest statute, the Court in Morales declared:

> If the Legislature's intent is clearly expressed, no further construction is permitted. Helder v Sruba, 462 Mich 92, 99; 611 NW2d 309 (2000). Under such circumstances, a court is prohibited from imposing a "contrary judicial gloss" on the statute. In re Certified Question (Kenneth Henes Special Projects Procurement v Continental Biomass Industries, Inc), 468 Mich 109, 119; 659 NW2d 597 (2003). * * *
>
> The statute makes no exception for periods of prejudgment appellate delay. In the face of the Legislature's clearly expressed intent, this Court will not read such an exception into the statute. [Morales, 490.]

The Court likewise has refused to permit tolling of the statute of limitations in other contexts where to do so would conflict with the plain language of the statutes at issue. See Boyle v General Motors Corp, 468 Mich 226; 661 NW2d 557 (2003) (refusing to apply the discovery rule to extend the statute of limitations applicable to actions for fraud as to do so would violate the plain language of the accrual statute, MCL 600.5827), Secura Ins Co v AutoOwners Ins Co, 461 Mich 382; 605 NW2d 308 (2000) (holding that the doctrine of judicial tolling may not be applied to extend a statute of limitations in the absence of language in the statute itself allowing such tolling). The plain language of the statute of limitations does not allow tolling under a continuing acts rationale or otherwise.

Furthermore, the concerns which lead the Court to embrace tolling are no longer as critical. In the nearly two decades since Sumner was decided, the public in general, and employees in particular, have become far more cognizant of their rights to be protected from discrimination and retaliation.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

B. Alternatively, The Continuing Violations Doctrine Of Sumner V Goodyear Tire & Rubber Co, Should Be Modified In Light Of National Railroad Passenger Corp v Morgan, 536 US 101 (2002).

Further, even if the plain language of the statute of limitations would permit tolling or extension of the statute of limitations in civil rights cases under some circumstances, this Court should endorse the clarification and limitation of the continuing acts doctrine set forth by the United States Supreme Court in National Railroad Passenger Corp v Morgan, 536 US 101 (2002), with respect to a claim, such as those asserted here, of discrete acts of retaliation.

In Sumner, the Court adopted the continuing acts doctrine in the first instance in reliance on the federal courts' interpretation of Title VII. The Court in Sumner adopted the following list of factors, from Berry v LSU Board of Supervisors, 715 F2d 971, 981 (CA 5, 1983), to be applied in the evaluation of whether the alleged continuous course of discriminatory conduct is of a nature to which the continuing violation doctrine would be applicable:

> "'The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a bi-weekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? [Sumner, 538, quoting Berry, 981.]

As noted by the Court in Sumner, 538, the last of these factors, the permanence or discovery rule generally is regarded as the core and most important element of the Berry test.

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

However, in Morgan, the United States Supreme Court applied statutory construction principles like those in Morales, supra, to limit the continuing violations doctrine. The Court in Morgan held that the continuing violations doctrine does not apply to extend the statute of limitations with regard to discrete acts of retaliation or discrimination (as distinguished from claims of hostile work environment).

In Morgan, the federal Court of Appeals had applied the continuing violations doctrine to what it termed "serial violations," holding that so long as one act falls within the charge filing period, discriminatory and retaliatory acts that are plausibly or sufficiently related to the act may also be considered for purposes of liability. The United States Supreme Court reversed, concluding that discrete retaliatory or discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges. The Supreme Court in Morgan declared:

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through March 3, 1995, the date that he was fired, the only incidents that took place within the timely filed period are actionable . . . . All prior discrete discriminatory acts are untimely filed and no longer actionable. [National Railroad Passenger Corp v Morgan, supra, footnotes omitted, emphasis added.]

In Morgan, the Court concluded: "[D]iscrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. Each discrete discriminatory act starts a new clock for filing charges alleging that act."

In Sharpe v Cureton, 319 F3d 259 (CA 6 2003), the Sixth Circuit Court of Appeals applied the Morgan analysis to hold time-barred firefighters' claims under 42

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

USC 1983 of retaliation by virtue of unwanted job transfers for political support in violation of their First Amendment rights. The Court in Sharpe, supra, noted that "the continuing violation doctrine arose in the context of the 'obviously quite short deadlines set forth in Title VII, and the relatively longer limitations periods provided by states for § 1983 actions reinforces as a policy matter Morgan's applicability to these claims." Likewise, the three-year period of limitations here under MCL 600.5805, is many times the 300- or 180-day period under Title VII, reinforcing Morgan's applicability to claims under the Michigan Civil Rights Act.

Application of Morgan to limit plaintiff's retaliation claims here is consistent with the rationale underlying Sumner itself. The specific nature of the claimed protected activity and the acts of retaliation here clearly preclude application of the continuing acts doctrine. Because there were separate, identifiable and temporally distinct alleged acts of retaliation consisting of the denial of 18 promotions over a 14-year period, each of which was permanent and immediately known to plaintiff, the continuing violations doctrine is inapplicable. This conclusion is mandated by the discovery rule rationale for this doctrine.

There was no evidence or claim by plaintiff herself that she did not realize she was being retaliated against when she was denied the promotions she requested. The only explanation for not suing or complaining sooner offered by plaintiff before or at trial was that she did not know that there was a "law that you could sue under a retaliation claim." (Apx 217a-218a, Tr, pp 1355-1356.) Ignorance of the law providing a remedy for a known wrong is clearly not a basis upon which the statute of limitations may be judicially ignored.

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

As evidenced by her grievance in 1987, plaintiff believed that the denial of her promotions were wrongful and for reasons other than her lack of qualifications years before this suit was filed. Each of the complained of denials of promotion was a discrete decision, the results of which were immediately known to plaintiff. Contrary to the Court of Appeals' conclusion here, the denials were not similar in type; they were with regard to a plethora of different positions, with different duties.

The Supreme Court in Morgan did indicate that the continuing violations doctrine would continue to apply to hostile environment claims, because they involve unlawful employment practices "which cannot be said to occur on any particular day, but occur over a series of days or years." Defendant submits that this remnant of the continuing violations doctrine should not be followed in Michigan, for the reasons set forth above.

In any event, however, this exception to the limitation on the continuing acts doctrine would have no factual application to this matter. Plaintiff here did not assert any claim of hostile environment outside of the statute of limitations (plaintiff identified the perceived instances of unpleasant treatment by Mr. Cathcart and/or after her move to First North as occurring within the three year limitations period, between 1992 and 1998.) Moreover, those claims of harassment occurring within three years of the filing of this suit, such as not being allowed to look at rainbows, or having an office in a poor location, were clearly so "trivial", as to not be independently actionable adverse employment actions. Pena v Ingham County Road Commission, 255 Mich App 299; 660 NW2d 351 (2003).

KITCH DRUTCHAS WAGNER DENARDIS & VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499
(313) 965-7900

The continuing violations doctrine of Sumner v The Goodyear Tire and Rubber Company, 427 Mich 505; 348 NW2d 256 (1986), was erroneously extended here by the

lower courts to negate the plain language of the statute of limitations, and permit claims based on 14 concrete, discrete acts alleged to be retaliatory, occurring three to 14 years before suit was filed.

A new trial is required for the submission to the jury of alleged acts of retaliation more than three years before this suit was filed.

KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900

RELIEF REQUESTED

WHEREFORE defendant Macomb County Community Mental Health Services respectfully requests that this Honorable Court reverse the judgments below, and:

Direct the entry of judgment of no cause of action in favor of defendant.

In the alternative, and if the Court determines that there was sufficient evidence to support one of the two retaliation theories, defendant seeks a new trial as to that theory only. Defendant further requests that the Court direct that summary disposition be granted as to claims based on acts more than three years before this suit was filed, as barred by the statute of limitations.

Respectfully submitted,

KITCH DRUTCHAS WAGNER
DENARDIS & VALITUTTI

By: 

SUSAN HEALY ZITTERMAN (P33392)
KAREN B. BERKERY (P38698)
Attorneys For Defendant
One Woodward Avenue, 10th Floor
Detroit, Michigan 48226-3499
(313) 965-7905

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KITCH DRUTCHAS
WAGNER DENARDIS
& VALITUTTI
ATTORNEYS AND COUNSELORS
ONE WOODWARD AVENUE
TENTH FLOOR
DETROIT, MICHIGAN
48226-3499

(313) 965-7900